

The Honorable CHRISTOPHER M. ALSTON  
Hearing Date: October 18, 2017  
Hearing Time: 1:00 p.m.  
Response Date: October 11, 2017  
Kitsap County Courthouse  
614 Division St.  
Courtroom 104  
Port Orchard, WA 98366

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re  
Eagle Harbor Holdings, LLC,  
Debtor.

Case No. 17-10722-CMA

Chapter 7

**NOTICE OF MOTION AND  
MOTION FOR RELIEF FROM THE  
AUTOMATIC STAY AND FOR  
RELATED RELIEF**

## **NOTICE OF MOTION**

NOTICE IS HEREBY GIVEN THAT: on **Wednesday, October 18, 2017, at 1:00 p.m.**, or as soon thereafter as counsel may be heard, Northwater Intellectual Property Fund L.P. 2 (“*Northwater*”) will move the Court for an order in the form of Attachment 1 hereto granting relief from the automatic stay (the “***Motion***”).

NOTICE IS FURTHER GIVEN THAT: should you desire to oppose the Motion you must, NO LATER THAN **Wednesday, October 11, 2017**, file your written response with the Bankruptcy Court Clerk's office and serve a copy on the undersigned counsel for Northwater, including the evidence, memoranda, and supporting papers you rely on in such opposition. If you file a response you are also required to appear at the hearing.

## MOTION FOR RELIEF FROM STAY – 1

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1 IF NO RESPONSE IS TIMELY FILED AND SERVED, THE COURT MAY, IN  
2 ITS DISCRETION, GRANT THE MOTION PRIOR TO THE HEARING WITHOUT  
3 FURTHER NOTICE, AND STRIKE THE HEARING.  
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8 **MOTION**  
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10 Northwater Intellectual Property Fund L.P. 2 (“*Northwater*”) hereby moves the  
11 Court for an Order terminating the automatic stay pursuant to 11 U.S.C. §§ 362(d)(1) and  
12 (d)(2) with respect to 32 patents and five patent applications in which Northwater has a first  
13 priority perfected security interest (the “*Northwater Collateral*”) as more fully described  
14 below, allowing Northwater to exercise its right to conduct a foreclosure sale and either sell  
15 or take title to its collateral. Northwater also requests clarification and related relief  
16 respecting its rights under the various Loan Documents (as defined below).  
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19 This Motion is based on the following Memorandum of Points and Authorities, the  
20 Declaration of Daniel Mills In Support of Motion for Relief From Stay (the “*Mills*  
21 *Declaration*”) filed herewith (including Exhibits A through K), the Declaration of Alan D.  
22 Smith In Support of Motion for Relief from Stay (the “*Smith Declaration*”) filed herewith  
23 (including Exhibits L through Q), and all pleadings, papers and records on file with the  
24 Court, and such other evidence, oral or documentary, as may be presented to the Court with  
25 respect to this Motion. A form of proposed order granting the relief requested herein is  
26 Attachment 1 hereto.  
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28

29 In support of the Motion, Northwater represents as follows:  
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32 **I. The MediusTech Loan and the Loan Documents**  
33

34 1. Eagle Harbor Holdings, LLC (“*EHH*” or “*Debtor*”) filed its voluntary  
35 chapter 7 petition in this case on February 20, 2017 (the “*Petition Date*”). Dkt. No. 1. John  
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MOTION FOR RELIEF FROM STAY – 2

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1 Peterson was appointed as the Chapter 7 trustee (the “**Trustee**”). Dkt. No. 2. The Trustee  
2 thereafter retained Alan Wenokur of Wenokur Riordan PLLC as counsel, Dkt. No. 17, along  
3 with Gregory Wesner of Lane Powell PC as special intellectual property counsel. Dkt.  
4  
5 No. 34.

6  
7 2. As far as Northwater is aware, or can be gleaned from the Schedules and  
8 Statement of Financial Affairs filed herein, EHH has only one significant asset – a portfolio  
9 of patents developed over a number of years by EHH’s former principal Dan Preston  
10 (“**Preston**”) and others. From what Northwater can determine, there are a total of  
11 approximately 38 patents (of which 32 are pledged to Northwater) and 8 patent applications  
12 (of which five are pledged to Northwater) included within the portfolio.

13  
14 3. In 2010, Northwater loaned \$2,000,000 U.S. (the “**MediusTech Loan**”) to  
15 MediusTech LLC (“**MediusTech**”) pursuant to the credit agreement dated November 16,  
16 2010 (the “**Credit Agreement**”). A true and correct copy of the Credit Agreement is  
17 attached to the Mills Declaration as Exhibit A. MediusTech is a wholly owned subsidiary of  
18 EHH. MediusTech’s and EHH’s only business throughout the time Northwater has been  
19 dealing with them has been to develop patent applications and to monetize the resulting  
20 patents through licensing and litigation. Mills Declaration, para. 2.

21  
22 4. Concurrently with the Credit Agreement, the MediusTech Loan (along with  
23 other obligations of MediusTech to Northwater) was guaranteed by debtor EHH pursuant to  
24 a Continuing Guaranty (“**EHH Guaranty**”). A true and correct copy of the EHH Guaranty  
25 is attached to the Mills Declaration as Exhibit B. *Id.*, para. 3.

26  
27 5. Concurrently with the Credit Agreement, MediusTech’s obligations under the  
28 MediusTech Loan and EHH’s obligations under the EHH Guaranty were secured by a Patent  
29 Security Agreement (the “**Patent Security Agreement**”) covering a number of patents and  
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MOTION FOR RELIEF FROM STAY – 3

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1 patent applications then owned by EHH, along with extensions, continuations, renewals, and  
2 reissues as described in more detail therein (the “*Northwater Collateral*”). A true and  
3 correct copy of the Patent Security Agreement is attached to the Mills Declaration as Exhibit  
4 C. *Id.*, para. 4.  
5

6. Concurrently and thereafter, MediusTech, EHH, and Northwater entered into  
7 a series of amendments, letter agreements, side agreements, and other documents containing  
8 certain understandings of the parties respecting the Credit Agreement, EHH Guaranty, and  
9 Patent Security Agreement and related documents. Among other things, during the several  
10 years following execution of the Credit Agreement, Northwater loaned significant additional  
11 sums to MediusTech and EHH, secured by the Northwater Collateral and the Patent Security  
12 Agreement, in order to fund litigation, including major litigation commenced against the  
13 Ford Motor Company, and for general working capital for the MediusTech/EHH patent  
14 monetization business. True and correct copies of those additional documents are attached  
15 to the Mills Declaration collectively as Exhibit D. Those additional documents, along with  
16 the Credit Agreement, EHH Guaranty, Patent Security Agreement, and Forbearance  
17 Agreement (described below) are referred to collectively as the “*Loan Documents*.  
18 *Id.*, para. 5.”  
19

20 7. Under the terms of the Patent Security Agreement, Northwater’s security  
21 interest covers not only the patents and patent applications specifically listed in the Patent  
22 Security Agreement, but also any extensions, continuations, renewals, and reissues.  
23 Attached as Exhibit E to the Mills Declaration is a list of the patents and patent applications  
24 owned by EHH and covered by Northwater’s security interest. All of the patents and patent  
25 applications on Exhibit E are either specifically listed on the schedule to the Patent Security  
26 Agreement or are on their face identified as extensions or continuations of those specifically  
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34 MOTION FOR RELIEF FROM STAY – 4

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1 listed patents (or on their face extensions or continuations of other extensions and  
2 continuations). Exhibit F to the Mills Declaration is a chart showing how each patent on  
3 Exhibit E relates by extension or continuation to others. Accordingly, the list of patents and  
4 patent applications on Exhibit E constitutes the Northwater Collateral. *Id.*, para. 6.  
5  
6  
7

8       8.     MediusTech and EHH entered into a License Agreement – Medius dated  
9 May 1, 2010 (the “**MediusTech License**”), under which EHH licensed a portion of its patent  
10 portfolio to MediusTech. Northwater presumes the license was granted in order to facilitate  
11 the MediusTech/EHH patent monetization business. A portion of the Northwater Collateral  
12 is included within the technology covered by the MediusTech License. A true and correct  
13 copy of the MediusTech License is attached to the Mills Declaration as Exhibit G. See also  
14 *id.*, para. 7.  
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22       9.     According to its Schedules, Dkt. No. 9, it appears EHH owns five other  
23 patents and three other patent applications not included within the Northwater Collateral  
24 (collectively referred to herein as the “**Other EHH Patent Rights**”).  
25  
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28       10.    Under the original Loan Documents, the MediusTech Loan was due and  
29 payable in full no later than November 16, 2015, the fifth anniversary of the Credit  
30 Agreement. MediusTech did not pay the MediusTech Loan at that time, and EHH did not  
31 pay on account of its Guaranty at that time. *Id.*, para. 8.  
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36       11.    After that default, effective as of December 30, 2015, MediusTech, EHH, and  
37 Northwater entered in a Forbearance Agreement pursuant to which Northwater agreed to  
38 forbear from exercising its rights and remedies against MediusTech and EHH, all on the  
39 terms and conditions set forth therein (the “**Forbearance Agreement**”). In the Forbearance  
40 Agreement, among other things MediusTech and EHH acknowledged the amount owing on  
41 the MediusTech Loan at that time was \$7,002,902.26. A true and correct copy of the  
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MOTION FOR RELIEF FROM STAY – 5

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1 Forbearance Agreement is attached to the Mills Declaration as Exhibit H. That  
2 \$7,002,902.26 figure was a significant discount from the amounts that would have been  
3 owed absent the concessions made by Northwater in the Forbearance Agreement. *Id.*, para.  
4  
5 10.

6  
7 12. The Forbearance Agreement allowed EHH and MediusTech an opportunity  
8 to sell their patent portfolio or otherwise to arrange for substitute financing. They were  
9 unsuccessful in those efforts. The forbearance period expired over a year ago, and neither  
10 MediusTech nor EHH has paid the amounts due under the MediusTech Loan. Under the  
11 Forbearance Agreement, interest at the default rate of 14% commenced on the agreed upon  
12 amount of \$7,002,902.26 on May 1, 2016, and has continued to date, compounded monthly.  
13  
14 *Id.*, para. 11-15.

15  
16 13. As of February 20, 2017, the petition date herein, the amount owed to  
17 Northwater by MediusTech under the MediusTech Loan, and by Debtor EHH under the  
18 EHH Guaranty, was \$7,839,787.50, and the amount owed as of October 31, 2017, will be  
19 \$8,633,733.76, with additional interest continuing to accrue after October 31. Attached to  
20 the Mills Declaration as Exhibit K is a spreadsheet showing the interest computations.  
21

22  
23 **II. Perfection and the Debtor's Shenanigans**

24  
25 14. Attached to the Smith Declaration as Exhibit L is a true and correct copy of  
26 results of a UCC Search recently conducted against EHH.  
27

28  
29 15. On September 14, 2015, Northwater caused to be filed in the UCC financing  
30 records of the Washington Department of Licensing a UCC-1 financing statement, No.  
31 2015-257-1533-6, perfecting Northwater's interest in the Northwater Collateral (the  
32 “**Northwater Financing Statement**”). A true and correct copy of the Northwater Financing  
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MOTION FOR RELIEF FROM STAY – 6

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1 Statement is attached to the Smith Declaration as Exhibit M and is also included within  
2 Exhibit L. Smith Declaration, para. 3.  
3

4       16. Attached to the Smith Declaration as Exhibit N is a true and correct copy of a  
5 recent sample search in the U.S. Patent and Trademark Office (“**USPTO**”) covering one  
6 patent within the Northwater Collateral, showing Northwater’s security filing with the PTO.  
7 Under governing Ninth Circuit law, a secured party need not file anything in the USPTO in  
8 order to perfect an interest in patents or patent applications. *In re Cybernetic Services, Inc.*,  
9 252 F.3d 1039 (9<sup>th</sup> Cir. 2001). In any event, as can be seen from Exhibit N Northwater  
10 made such a filing.  
11  
12

13       17. In early February 2017, after Northwater had delivered a Notice of Default to  
14 EHH and MediusTech, EHH apparently authorized two filings in the UCC filing records  
15 with the Department of Licensing: an amendment purportedly “deleting collateral” from the  
16 Northwater Financing Statement and another amendment purportedly terminating  
17 Northwater’s Financing Statement. Those two documents are referred to herein as the  
18 “**Debtor’s Unauthorized Filings**.<sup>1</sup>” The Debtor’s Unauthorized Filings are included within  
19 Exhibit L to the Smith Declaration, the UCC search results.  
20  
21

22       18. The Debtor’s Unauthorized Filings were not authorized in any way, shape, or  
23 form by Northwater, the sole holder of rights as lender and secured party under the Loan  
24 Documents and the Northwater Financing Statement. Mills Declaration, para. 16. The  
25 Debtor’s Unauthorized Filings were blatantly inappropriate and constituted a fraud on  
26 Northwater and on the UCC system.<sup>1</sup>  
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45       1 There are provisions in the UCC allowing a debtor to file termination amendments when a debt has been  
46 satisfied in full and certain procedural steps are taken . RCW 62A-509(d); RCW 62A-513. Needless to say,  
47 those provisions are inapplicable here.

MOTION FOR RELIEF FROM STAY – 7

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1       19.     Samuel S. Hemingway executed the Debtor's Unauthorized Filings on behalf  
2 of the Debtor. At the 341 Initial Meeting of Creditors in this case, Mr. Hemingway admitted  
3 he did no research into the propriety of making such filings and that he made the filings at  
4 the direction of his boss Dan Preston. Mr. Preston was present at the 341 meeting and did  
5 not deny or otherwise attempt to correct Mr. Hemingway's statements. Smith Declaration,  
6 para. 12.  
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12       20. Immediately upon learning of the Debtor's Unauthorized Filings, Northwater  
13           attempted to clean up the mess the Debtor had made with its Unauthorized Filings, by filing  
14           Information Statements in the UCC filing records making it clear the Debtor's Unauthorized  
15           Filings were in fact completely unauthorized and of no legal effect. Those Information  
16           Statements are also included within Exhibit L, the UCC search results. *Id.*, para. 7.  
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22        21. Northwater has reserved all rights against EHH, MediusTech, and the  
23 individuals responsible for the Debtor's Unauthorized Filings, but has not yet brought any  
24 civil proceedings or filed any criminal complaints relating to the filings. *Id.*, para. 13.  
25  
26  
27

### **III. Prepetition Enforcement Actions**

30           22. On January 25, 2017, Northwater caused to be sent to MediusTech and EHH  
31           a Notice of Default and Acceleration. *Id.*, para. 5 and Exhibit O thereto.  
32  
33

34       23. On February 7, 2017, Northwater caused to be sent to MediusTech and EHH  
35 a Notification of Disposition of Collateral by Public Sale. *Id.*, para. 8 and Exhibit P thereto.  
36  
37 That Notification was sent to all known parties claiming a security interest in the Northwater  
38 Collateral. The public sale described in such Notification of Disposition of Collateral was  
39 originally scheduled for February 20, 2017, and thereafter continued to February 21, 2017,  
40 on notice to all parties.  
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## MOTION FOR RELIEF FROM STAY – 8

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1           24. As part of the process of publicizing the upcoming foreclosure sale,  
2 Northwater also arranged for an ad to be placed in the national edition of the Wall Street  
3 Journal on Friday, February 10, 2017. A copy of the ad is attached to the Smith Declaration  
4 as Exhibit Q. Because of the cost of that kind of ad, it describes the collateral generally and  
5 contains a link to a website with a list of the actual patent and patent application numbers.  
6 Exhibit Q includes a copy of the document that is available on the website from following  
7 the link in the WSJ ad. *Id.*, para. 9.  
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10          25. Debtor EHH filed its voluntary Chapter 7 petition the day before the  
11 scheduled foreclosure sale, on February 20, 2017. Because the petition was filed so close to  
12 the scheduled sale, Mr. Smith as Northwater's representative was present at the appointed  
13 time and place for the sale, in order to inform anyone interested in bidding on the assets of  
14 the filing and the automatic stay. No one appeared. *Id.*, para. 10.  
15  
16

17          26. MediusTech is not a debtor in any proceedings under Title 11. Accordingly,  
18 actions against MediusTech are not subject to the automatic stay, and on March 7, 2017,  
19 Northwater commenced a lawsuit against MediusTech. Because Debtor EHH's schedules  
20 made it clear EHH was the owner of 100% of the shares of MediusTech, and because the  
21 Trustee immediately took appropriate actions on behalf of EHH as shareholder to ensure that  
22 the former officers of the subsidiary MediusTech would not have any continuing authority,  
23 Northwater has held that lawsuit in abeyance and it has never been prosecuted. *Id.*, para. 14.  
24  
25

#### 36           **IV. The Collateral** 37 38

39          27. Exhibit E to the Mills Declaration is the list of patents and patent applications  
40 included within the Northwater Collateral. Northwater's security interest was perfected by  
41 filing the Northwater Financing Statement in mid-2015, well outside the preference period.  
42 As demonstrated by the UCC search, Exhibit L, Northwater was the first to file a financing  
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MOTION FOR RELIEF FROM STAY – 9

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1 statement against the Northwater Collateral. Northwater has a perfected first priority  
2 security interest in the Northwater Collateral.  
3

4 28. Notwithstanding this clear record and straightforward logic, prior to the  
5 petition herein EHH's principal Dan Preston argued (and included within the Debtor's  
6 Unauthorized Filings) that Northwater's security interest was limited to the "field of use" of  
7 automotive infotainment. The Trustee is aware of Preston's argument and as far as  
8 Northwater knows has not adopted it, but also has not conceded the argument is without  
9 merit.  
10  
11

12 29. The argument is indeed without merit. First, the language of the Patent  
13 Security Agreement is not ambiguous. It includes in the definition of Collateral:  
14

15 all United States patents and certificates of inventions, or similar industrial  
16 property rights, and applications for any of the foregoing (collectively, the  
17 "Patents") relating to the Automotive Infotainment, including, without  
18 limitation, the patents and applications referred to in Schedule A hereto, . . .  
19 and all reissues, divisions, continuations, renewals, extensions and  
20 continuations-in-part thereof;  
21  
22

23 30. That language is clear. The listed patents and applications are included  
24 within the collateral. The phrase "relating to the Automotive Infotainment" is a descriptor –  
25 if there are other patents or applications owned by EHH in that area, they will be added to  
26 the list. But you cannot read that language as limiting the security interest in the listed  
27 patents to that particular "field or use" or otherwise as limiting the grant in any way. The  
28 grant on its face includes all of the patents on the list, plus continuations etc.  
29  
30

31 31. Second, it would be bizarre for a lender to advance significant money secured  
32 by a "field of use." By definition, this would become an issue only when the borrower has  
33 defaulted and the lender is foreclosing. A lender who took a security interest in a field of  
34 use (assuming that was possible, which it is not, see below) would then be forced to deal  
35 with the collateral as defined in the security agreement.  
36  
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38 MOTION FOR RELIEF FROM STAY – 10  
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1 forever with the borrower – who just defaulted on the loan – over scope, respective use  
2 rights, infringement on the other’s field, and similar things. It is near guaranteed misery for  
3 the lender who wants control of the patents and freedom from its defaulted borrower. It  
4 would make no sense.  
5

6  
7 32. Third, there is no such thing as a security interest in a field of use. That is not  
8 a legally cognizable asset that can be encumbered. Is it possible to get to that result  
9 notwithstanding the lack of wisdom of the endeavor for the lender? Yes, by executing a  
10 license limited to the field of use (which is indeed possible), then granting a security interest  
11 in the license. But that clearly is not what happened here. The documents do not say that  
12 because they were not intended to say that.  
13

14 33. While this is an imperfect analogy, it is something like granting a deed of  
15 trust on your living room. You cannot do it – it’s not a legal parcel. You might be able to  
16 accomplish mostly the same result by leasing or licensing the living room, then granting a  
17 security interest in the lease or license. But again, that is a very different structure and a  
18 very different set of documents.  
19

20 34. Finally, Preston’s argument is inconsistent with the facts and is nothing more  
21 than an attempt to recast the deal years after the fact. The deal was a security interest in the  
22 listed patents and applications, plus others that might be (and were) developed in subsequent  
23 years. There was no such limitation to field of use. Mills Declaration, para. 21.  
24

25  
26 **V. Relief from Stay is Appropriate Here**  
27

28 35. Section 362(d) of the Code provides that relief from the automatic  
29 stay shall be granted “for cause, including the lack of adequate protection of an  
30 interest in property.” 11 U.S.C. §362(d)(1). Relief from the automatic stay shall  
31 also be granted with respect to the stay of an act against property if “(A) the debtor  
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33 MOTION FOR RELIEF FROM STAY – 11

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1 does not have an equity in such property; and (B) such property is not necessary to  
2 an effective reorganization.” 11 U.S.C. §362(d)(2). Northwater is entitled to relief  
3 from stay under both §362(d)(1) and (d)(2).

4

5

6 **A. Relief From Stay Should Be Granted For Cause Under Section 362(d)(1).**

7

8       36. The term “cause” is not defined in Section 362 or anywhere else in the  
9 Bankruptcy Code. However, courts have considered “cause” in the context of Section 362  
10 stay relief proceedings on many occasions, and have found cause for relief from stay in a  
11 variety of circumstances not involving a lack of adequate protection:

12

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15

- 16       • The case was commenced in bad faith. *In re Laguna Associates Ltd. Partnership*, 30  
17 F.3d 734 (6<sup>th</sup> Cir. 1994).
- 18       • Litigation should be continued or commenced in another forum. *In re Castlerock*  
19 *Properties*, 781 F.2d 159 (9<sup>th</sup> Cir. 1986).
- 20       • A claimant wants to pursue an insurance company that has provided coverage to the  
21 debtor. *In re Fernstrom Storage & Van Co.*, 938 F.2d 731 (7<sup>th</sup> Cir. 1991).

22

23

24       37. The point is not that those precise fact patterns are present here; the point is  
25 that this Court has the ability to grant relief from stay when the stay is no longer appropriate  
26 under the circumstances. As the Ninth Circuit put it in *Castlerock*, “discretionary relief  
27 from the stay must be determined on a case by case basis.” 781 F.2d at 163. And as the  
28 Seventh Circuit noted in *Fernstrom*, “[s]uspension of [the automatic stay] may be consonant  
29 with the purposes of the Bankruptcy Act when equitable considerations weigh heavily in  
30 favor of the creditor and the debtor bears some responsibility for creating the problems.”  
31  
32       938 F.2d at 735.

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35       38. Cause exists here. This was a case commenced on the eve of foreclosure,  
36 long after the secured loan had matured, and after years of failed efforts to do something

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MOTION FOR RELIEF FROM STAY – 12

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1 with the patent portfolio. It may not fit squarely into the traditional bad faith filing box,  
2 because there are other creditors and it was filed as a Chapter 7 case rather than a Chapter 11  
3 case. But even those “distinguishing” facts militate in favor of relief from stay. Yes, there  
4 are other creditors – but most of them go back many years, have never exercised any  
5 remedies despite being unpaid millions of dollars for a decade or more,<sup>2</sup> and smell much  
6 more like equity investors than true creditors. And yes, this is a Chapter 7 case, so it does  
7 not involve old management desperately attempting to hang on to power – but that makes it  
8 look even more like a punitive last gasp effort from that old management to delay  
9 Northwater’s exercise of remedies rather than an effort to do anything in the way of  
10 reorganization.

11       39. These facts taken together constitute cause for discretionary relief from stay  
12 under the first clause of Section 361(d)(1).

13       **B. Relief From Stay Must Be Granted For Lack of Adequate Protection Under**  
14       **Section 362(d)(1).**

15       40. Similarly, “adequate protection” is not defined in Section 362. However,  
16 Section 361 sets forth three non-exclusive examples of what may constitute adequate  
17 protection: (1) periodic cash payments equivalent to any decrease in value of the secured  
18 party’s interest in the collateral; (2) an additional or replacement lien on other property; or  
19 (3) other relief that provides the “indubitable equivalent” of the secured party’s interest in  
20 the collateral. 11 U.S.C. § 361. The Trustee can provide none of these forms of adequate  
21 protection.

22       41. To begin with, there is a need for some sort of adequate protection. While it

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23       42       2 Indeed, a review of the Schedules indicates most of the investment money dates back to before the Debtor’s  
24 formation in 2010, having apparently been assumed in connection with a corporate restructuring that predated  
25 even the MediusTech Loan from Northwater. Dkt. No. 9.

1       is difficult to quantify the amount of ongoing diminution in value of the Northwater  
2       Collateral, it is clear there is some such diminution. These are patents. They have a limited  
3       life. As we get closer to their expiration, they will approach zero value. Their value is  
4       diminishing over time. Wasting more time without an immediate sale or foreclosure will  
5       erode the value even further. Adequate protection is needed.  
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10       42.      The estate has no way of providing any conceivable means of adequate  
11       protection. The estate has essentially no cash and no income, thus it is unable to make  
12       periodic adequate protection payments. The Schedules and SOFA make that clear.  
13  
14

15       43.      The estate does have a certain amount of unencumbered property on which  
16       the Trustee could offer replacement liens – the Other EHH Patent Rights, the remainder of  
17       the patent portfolio not included within the Northwater Collateral, consisting of five patents  
18       and three patent applications.<sup>3</sup> However, the Trustee apparently has no intention of offering  
19       that as adequate protection, but instead intends to maintain those assets free and clear of  
20       liens in order to provide a recovery for general unsecured creditors.<sup>4</sup>  
21  
22

23       44.      Finally, the Debtor's Schedules and SOFA document the Debtor's lack of  
24       any other significant assets and complete inability to offer any "indubitable equivalent" with  
25       which to protect Northwater's security position.  
26  
27

28       45.      In addition to the examples of adequate protection specifically listed in  
29       Section 361, some courts have found that an equity cushion, if sufficiently large and not  
30       subject to erosion, may provide adequate protection.<sup>5</sup> However, there does not appear to be  
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<sup>3</sup> The estate also owns all of the equity of MediusTech, but the Debtor acknowledges in the Schedules that  
34       equity is valueless. Dkt. No. 9. That acknowledgement is hardly necessary, given the lack of assets in  
35       MediusTech, the existence of the Northwater debt, and the millions of dollars of other debt at MediusTech.  
36  
37

<sup>4</sup> Northwater is prepared to cooperate with the Trustee in this endeavor by waiving its deficiency. See  
38       Section V-D below.  
39  
40

<sup>5</sup> *In re Kost*, 102 B.R. 829 (Bankr. D. Wyo. 1989); *In re Chauncey St. Assoc. Ltd. Partnership*, 107 B.R. 7  
41       (Bankr. D. Mass. 1989); *In re Triplett*, 87 B.R. 25 (Bankr. W.D. Tex. 1988); but see, *Margell v. Bouquet*  
42

MOTION FOR RELIEF FROM STAY – 14

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1 any equity cushion whatsoever in the Northwater Collateral, see the next section of this  
2 Motion. Indeed, Northwater is significantly undersecured and, as a result of the diminution  
3 in value and increased interest, were there any such cushion (which there is not) it would  
4 rapidly be eroding.  
5

6       46. This estate has no available unencumbered property, no equity cushion, no  
7 other assets, no cash and no income. There is simply no way for Northwater's eroding value  
8 security interest to be adequately protected. Thus, relief from stay is mandated by the  
9 second clause of §362(d)(1), lack of adequate protection.  
10

11      C. **Relief From Stay Must Be Granted Under Section 362(d)(2) Because the Debtor  
12 Has No Equity In the Northwater Collateral and the Northwater Collateral Is  
13 Not Necessary to an Effective Reorganization.**  
14

15       47. Section 362(d)(2) of the Code provides that the Court shall grant relief from  
16 the automatic stay if: (1) the Debtor does not have any equity in the collateral at issue and  
17 (2) the collateral is not necessary to an effective plan of reorganization. Both elements of  
18 §362(d)(2) must be met: there must be no equity and the property must be unnecessary for  
19 effective reorganization. See, e.g., *In re Egea*, 167 B.R. 226 (Bankr. D. Kan. 1994).  
20

21       48. A debtor has no equity in property for purposes of §362(d)(2)(A) when the  
22 total debt secured by liens on the property equals or exceeds the value of the property. *In re*  
23 *Indian Palms Assocs., Ltd.*, 61 F.3d 197 (3d Cir. 1995). For purposes of § 362(d)(2)(A), all  
24 liens, including those senior and junior to the moving party's lien, are considered in  
25 determining whether the debtor has equity in the property. *Stewart v. Gurley*, 745 F.2d  
26 1194, 1196 (9<sup>th</sup> Cir. 1984).  
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45 *Investments*, (*In the Matter of Bouquet Investments*), 32 B.R. 988 (Bankr. C.D. Cal. 1983) (equity cushion  
46 alone insufficient to support continuation of automatic stay); *Kelley v. Embrey*, (*In the Matter of Embrey*), 56  
47 B.R. 626 (Bankr. W.D. Mo. 1986).

1           49. The total secured debt against the Northwater Collateral is somewhat  
2 difficult to discern as a result of some questionable transactions appearing in the record.  
3 According to the Debtor's schedules in this case, Northwater is the only secured creditor.  
4 Schedule D, Dkt. No. 9. That is, in fact, Northwater's understanding, see Mills Declaration  
5 para. 17. However, according to the UCC filings, Exhibit L, at least two other entities at one  
6 point claimed an interest in the Northwater Collateral: Mirai Ventures LLC and Clarovia,  
7 LLC.  
8

9           50. Mirai filed a UCC-1 financing statement against the Debtor on January 27,  
10 2017, after Northwater gave the Notice of Default under the MediusTech Loan. Mirai's  
11 interest has never been clarified; it is likely it never did the purported financing deal that  
12 would have led to a perfected security interest, but one cannot be sure. Mills Declaration,  
13 para. 19; Smith Declaration, para. 11.

14           51. Clarovia is apparently another company owned by Dan Preston, the former  
15 principal of the Debtor; it filed a UCC financing statement against the Debtor on January 30,  
16 2017 (again, after EHH received the Notice of Default from Northwater), attaching a  
17 promissory note dated January 27, 2017 and apparently based on old alleged obligations of  
18 the Debtor to Clarovia. The Clarovia security interest is clearly avoidable, but as far as  
19 Northwater is aware Clarovia has neither admitted that nor done anything to remove it from  
20 the UCC records. Smith Declaration, para. 11.

21           52. In any event, even without considering the Mirai and Clarovia liens, the  
22 Northwater Collateral is subject to Northwater's claims, which exceed \$8.6 million. Mills  
23 Declaration, para. 15 and Exhibit K.

24           53. The value of the Northwater Collateral is also difficult to ascertain with  
25 certainty, but all available evidence points to a value considerably lower than the amount of  
26

MOTION FOR RELIEF FROM STAY – 16

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1 the outstanding debt against it.  
2  
3

- 4 • The Debtor indicated a book value for all of its patent portfolio – both the  
5 Northwater Collateral and the other patents not included in the Northwater Collateral  
6 – as approximately \$6.4 million. Schedule A filed herein, Dkt. No. 9.  
7  
8 • For years prior to the bankruptcy, MediusTech and EHH attempted to “monetize” the  
9 patent portfolio by suing others who were allegedly infringing the patents. That  
10 effort was underway for many years even before Northwater made the MediusTech  
11 Loan. After the MediusTech Loan, millions of dollars (Northwater’s dollars) were  
12 spent on a lawsuit against Ford Motor Company, which unfortunately was  
13 unsuccessful. Mills Declaration, para. 9.  
14  
15 • After the MediusTech Loan had matured and was in default, in accordance with the  
16 Forbearance Agreement MediusTech and EHH attempted to find a buyer for the  
17 portfolio. They retained a reputable patent broker, David Smith and Tynax, Inc.,  
18 who contacted over 150 potential buyers and tried to sell the portfolio for over eight  
19 months; Northwater held off for months after the Forbearance Agreement expired to  
20 allow that process to continue. *Id.*, para. 12 and Exhibits I and J. Exhibits I and J  
21 contain lengthy descriptions of the extensive efforts undertaken by David Smith and  
22 Tynax.  
23  
24 • Despite these efforts, MediusTech and EHH were unsuccessful in bringing anyone to  
25 the table other than a long term speculative play (interestingly, led by Mirai  
26 Ventures) that provided no cash to any of the parties in interest and no assurance  
27 whatsoever there would ever be any cash. *Id.*, para. 13.  
28  
29 • Since the bankruptcy filing, the Trustee has apparently continued to engage in such efforts.  
30 Northwater has not executed any confidentiality or nondisclosure agreements, but does not  
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MOTION FOR RELIEF FROM STAY – 17

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1 wish to violate any such understandings so will not use any numbers. But Northwater can  
2 disclose that to date it has been informed of only two postpetition offers for any or all of the  
3 patent portfolio. One was for very little money for two patents not included in the  
4 Northwater Collateral (and thus of little interest to Northwater) but which was quickly  
5 withdrawn by the buyer; the other was purportedly for the whole portfolio (both Northwater  
6 Collateral and the Other EHH Patent Rights) but was for only a small fraction of the  
7 Northwater debt and in any event was rejected by the Trustee without a counter and without  
8 even asking Northwater whether it was worth pursuing. *Id.*, para. 20.  
9  
10

11 54. In short, the only cash offers to date – after years of marketing the patent  
12 portfolio, both prepetition and postpetition – would have yielded only a small fraction of  
13 what is owed Northwater. The Northwater debt exceeds the value of the Northwater  
14 Collateral. The estate has no equity in the collateral.  
15  
16

17 55. Further, in order to avoid the consequences of Section 362(d)(2) a debtor  
18 must do more than simply claim that no reorganization is possible without the Property.  
19 *United States Assoc. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365,  
20 375-76 (1988). The debtor must also show that there is reasonable possibility of an *effective*  
21 reorganization. *Id.* This means there “must be a reasonable possibility of a successful  
22 reorganization within a reasonable time” and that the property at issue is necessary to that  
23 reorganization. *Id.* See also *In re Dublin Properties*, 12 B.R. 77, 80 (Bankr. E.D. Pa. 1981)  
24 (“If all the debtor can offer at this time is high hopes without any financial prospects on the  
25 horizon to warrant the conclusion that a reorganization in the near future is likely, it cannot  
26 be said that the property is necessary to an ‘effective’ reorganization.”)  
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29 56. This is a Chapter 7 case. There will be no reorganization here; it is a  
30 liquidation case. There cannot possibly be a reorganization of any sort, much less an  
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33 MOTION FOR RELIEF FROM STAY – 18

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1 effective reorganization.  
2

3       **D. At the Requested Foreclosure Sale, Northwater Has the Right to Credit Bid Up  
4 to the Amount of its Debt**

5       57. Under Section 363(k) of the Bankruptcy Code, Northwater – as secured  
6 creditor with interests in all of the Northwater Collateral – has the right to credit bid up to  
7 the amount of its debt in any 363 sale conducted in this case. It goes without saying the  
8 same rule will apply in the foreclosure sale Northwater intends to conduct if relief from stay  
9 is granted as requested in this Motion.

10      58. Northwater is sensitive to the concerns some may express over the  
11 possibility that Northwater will conduct a foreclosure sale in a manner that hurts other  
12 creditors, by underbidding and leaving a large deficiency claim, thus diluting other  
13 creditors' recoveries. If Northwater is granted relief from stay and other requested relief on  
14 a reasonable schedule in response to this Motion, Northwater will waive any deficiency  
15 remaining against the EHH estate after the sale. Mills Declaration, para. 22.

16      **E. The MediusTech License is of No Further Force and Effect**

17      59. To the extent it has any validity at all, the MediusTech License is an  
18 executory contract within the meaning of Section 365. As such, it was rejected by EHH as a  
19 matter of law on April 21, 2017, 60 days after the order for relief. Section 365(d)(1).

20      60. The MediusTech License appears to be a license of intellectual property  
21 within the meaning of Section 365(n). If so, MediusTech as nondebtor party would have the  
22 right to treat the license as terminated or to retain certain rights. Section 365(n)(1)(A)  
23 and (B). Here, MediusTech is a valueless shell with no assets, millions of dollars of  
24 liabilities, and no ability to maintain any business operations. It is a wholly owned  
25 subsidiary of a Chapter 7 debtor. Having done nothing in the six months since the license  
26

was rejected, MediusTech must be deemed to have elected to treat the license as terminated.

## **VI. Conclusion**

61. For seven years the Debtor and now the Trustee have tried to put together some kind of program that would pay off Northwater and provide a return to other creditors. It did not work for the Debtor; and it is not working for the Trustee. There is no reasonable prospect of a sale. The estate has no cash, no unencumbered property other than the Other EHH Patent Rights (which have also proven essentially unsalable), and no means of providing adequate protection to Northwater. All the Trustee can offer is the same "high hopes" the Debtor has had all these years: somehow we'll come up with something that will pay off in the end.

62. Northwater should not have to wait any longer. These are wasting assets: patents have expiration dates, and those dates are approaching in a few years. If relief from stay is granted on a normal schedule in response to this Motion, Northwater will waive any deficiency claim and the Trustee can try to market the remaining patents in whatever way he chooses. But Northwater wants to – and has a right to – control its own destiny and its collateral.

## MOTION FOR RELIEF FROM STAY – 20

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1           63. We are seven months into this Chapter 7 case. Chapter 7 is entitled  
2           “Liquidation.” It is the job of a Chapter 7 trustee to liquidate the assets of the estate, not to  
3           organize and manage a complicated litigation and licensing “monetization program.” It is  
4           past time to liquidate the assets. Northwater has demonstrated cause for relief from stay.  
5  
6           The Court should enter an Order in the form attached hereto so that Northwater can  
7           foreclose on its collateral and get on with its business.

8  
9           DATED: September 22, 2017

10  
11           **PERKINS COIE LLP**

12  
13           By: /s/ Alan D. Smith

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26           MOTION FOR RELIEF FROM STAY – 21

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**ATTACHMENT 1**

**FORM OF PROPOSED ORDER**

See attached form of Order and attached list of Northwater Collateral.

MOTION FOR RELIEF FROM STAY – 22

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